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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

EARL HARRIS,

Defendant and Appellant.

B205745

(Los Angeles County  
Super. Ct. No. BA302062)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Kathleen Kennedy-Powell, Judge. Affirmed.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven E. Mercer and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

Earl Harris was convicted of murder (Pen. Code,<sup>1</sup> § 187, subd. (a)), attempted robbery (§§ 211, 664), and conspiracy to commit robbery (§ 182, subd. (a)(1)). On appeal, he argues that his convictions should be reversed because the jury was not instructed on the lesser included offenses of second degree murder and voluntary manslaughter, as well as the defense theory of self-defense; and because there was insufficient independent evidence to corroborate the accomplice's testimony.

## **FACTUAL AND PROCEDURAL BACKGROUND**

Earl Harris and Kenneth Butler sold drugs out of Room 253 at the Huntington Hotel. Charles Ray worked as a lookout for Harris in exchange for drugs.<sup>2</sup> Also at the Huntington Hotel, Marvin Williams sold drugs from a room that he shared with his girlfriend, Linda McDowell.<sup>3</sup>

In January 2006, McDowell saw Williams argue with Harris three or four times. A few days before January 28, 2006, Butler and Harris approached her, placed their arms around her, and told her that while they had no problem with her, she needed to tell Williams “to quit what he is doing.” They told her that they knew Williams had guns and that they had them too.

On January 28, 2006, Harris, Butler, Ray, and two other men met in Room 253. Harris discussed a plan to eliminate his competition by robbing Williams and another drug dealer in the hotel. Harris decided that they would rob Williams first. Harris also indicated that they would involve a man named Kevin Smith because he had dated McDowell and could assist if she posed a problem during the robbery. Harris and Butler had firearms at the meeting. Harris's firearm was semi-automatic; Butler's gun was a nine millimeter handgun that Ray recognized as one he had left in Room 253. Ray first

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<sup>1</sup> Unless otherwise indicated, all further statutory references are to the Penal Code.

<sup>2</sup> Ray testified under a grant of use immunity.

<sup>3</sup> McDowell testified under a grant of use immunity.

saw Harris and Butler with guns about 30 minutes after they discussed the plan to rob Williams.

While the men waited for Smith to arrive, Harris instructed Ray to find out if Williams was in his room. Ray reported back that he saw Williams returning to his own room. Forty-five minutes to an hour later, Harris gave Ray money to purchase heroin from Williams so that they could confirm Williams was still in his room. Ray went to Williams's room and bought the heroin. Ray asked if he could come back to buy more, but Williams said that he did not have any more drugs.

Williams was apparently suspicious about the transaction with Ray, who had never bought heroin from him before. After making the sale, Williams looked up and down the hallway before closing the door. Inside the room, Ray heard Williams tell someone that Ray had never bought drugs from him before and that it was "weird." Upon returning to Room 253, Ray told Harris that Williams was "spooked," but Harris shrugged it off.

Smith eventually arrived and Harris explained the plan. Ray agreed to help with the robbery because he wanted crack cocaine. Ray stated that he was afraid that his relationship with Harris would be over if he did not agree to the plan, and also testified that he was afraid that he would be killed if he did not go along with their scheme.

Harris indicated that it was time to go. The men approached Williams's room in two separate groups from opposite directions. The men all wore hooded sweatshirts with the hoods pulled over their heads. They also wore gloves to avoid leaving fingerprints.

When the men arrived on the third floor, Harris directed Ray to place tape over the peephole of the door across from Williams. Ray did so, then went to Williams's door, which had no peephole, where Harris and Butler were waiting.

Ray testified that, immediately before he knocked on Williams's door, Harris told him that they were not going to rob Williams and that Harris just wanted to talk to him. Ray did not believe that Harris had changed his mind because it seemed that they were following the plan.

Ray then knocked on the door and told Williams that it was him. Ray moved away from the door, fearing that if he did not move he might be shot. As Williams

opened the door, Harris was standing on Ray's right side and Butler was to Ray's left. Ray then heard three gunshots—one boom, and two pops. Ray testified that Williams was the first person to shoot and that he fired his gun as soon as he opened the door. Harris fired two shots at Williams.

Harris, Ray, and Butler fled to Room 253. Harris and Butler left their guns in the room and the three men left the hotel. Williams died from multiple gunshot wounds. The fatal shot to his chest damaged his aorta and caused a hemorrhage. Another shot entered his body a little above the waist and exited through the back; it was not fatal.

The shooting was witnessed by Paul Foley, who frequently used drugs at the Huntington. Foley reported that he saw a number of people in dark, hooded sweatshirts converge on Williams's room from both sides; one of them looked like Ray. No one in the group spoke. Someone knocked on the door. When the door opened, Foley heard three gunshots. Foley believed that the first two shots were fired from the hallway and that the third was fired from Williams's room.

McDowell, who was in Williams's room at the time of the shooting, also heard three shots. She helped Williams into the room from the doorway and called 911. She placed their guns in the microwave and covered up visible drugs, and then, at Williams's direction, she took some money and left.

Officers found the guns in the microwave. The revolver was fully loaded. The semi-automatic gun had a bullet in the chamber and two more in the magazine. One bullet casing was recovered from the hallway, just outside Williams's door. Another was recovered from inside the room. Both casings came from the same gun, but they did not come from Williams's gun.

Harris was arrested February 10, 2006. Officers recovered a cell phone handset from him. The serial number of the phone matched one registered to "Earl Harlis" under a prepaid cell phone account. When Butler was arrested, the SIM card in the cell phone he possessed was the SIM card associated with the cell phone account of "Earl Harlis" and the handset recovered from Harris.

Cell phone records showed that the SIM card recovered from Butler had been near the Huntington at 9:32 p.m. and 11:07 p.m. on the night of the shooting, and that it was miles away from the hotel by early the next morning. At approximately 2:00 a.m. the morning after the shooting, the SIM card was near Compton and received a phone call from another prepaid cell phone registered to Harris.

Harris was charged with conspiracy (§ 182, subd. (a)(1)), murder (§ 187, subd. (a)), and attempted robbery (§§ 211, 664), all with additional special allegations. He and Butler were tried together. Neither Butler nor Harris testified at trial or presented any evidence in their defense.

The jury found Harris guilty of first degree murder, attempted robbery, and conspiracy to commit robbery. The jury found that the murder of Williams was committed while Harris was engaged in the commission of a robbery within the meaning of section 190.2, subdivision (a)(17), and also found true multiple firearm enhancements. Harris appeals.

## **DISCUSSION**

### **I. Denial of Requested Jury Instructions**

The trial court refused Harris's request for jury instructions on second degree murder, voluntary manslaughter, and self-defense. A trial court has a duty to instruct a jury on any lesser offense that is necessarily included in the charged offense if there is substantial evidence that only the lesser offense was committed. (*People v. Birks* (1998) 19 Cal.4th 108, 112.)

Harris argues that there was substantial evidence to support instructions on second degree murder, voluntary manslaughter, and self-defense; the Attorney General argues that there was no substantial evidence to warrant giving these instructions. Even if we assume that there was substantial evidence to support these theories, any error by the trial court in failing to instruct the jury as requested was harmless. “Error in failing to

instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions.’ [Citation.]” (*People v. Horning* (2004) 34 Cal.4th 871, 906 (*Horning*), quoting *People v. Lewis* (2001) 25 Cal.4th 610, 646.)

In *Horning, supra*, 34 Cal.4th at pages 904-905, the defendant was convicted of first degree felony murder and argued on appeal that the trial court erred in failing to instruct the jury on second degree murder as a lesser included offense. The California Supreme Court held that any such error was harmless because the jury was instructed on the robbery-murder and burglary-murder special circumstances and found both special circumstances to be true. (*Id.* at p. 906.) In so doing, the jury “found that defendant killed the victim in the perpetration of robbery and burglary, which means it necessarily found the killing was first degree felony murder.” (*Ibid*; see also *People v. Lancaster* (2007) 41 Cal.4th 50, 85 [finding that an alleged error in failing to instruct on second degree murder was harmless because “the jury returned a true finding on the kidnapping-murder special circumstance [citation], and therefore necessarily rejected the factual theory on which defendant’s argument for a second degree murder instruction rests”]; *People v. Prince* (2007) 40 Cal.4th 1179, 1268 [rejecting argument that trial court erred in failing to instruct on second degree murder in part because the jury found true the special circumstance allegation that the defendant killed the victim in the course of a rape or attempted rape, thereby specifically establishing that the jury determined that the murder was a felony murder].)

Here, the jury was instructed that, to find the robbery-murder special circumstance to be true, it must be proved that “[t]he murder was committed while a defendant was engaged in or was an accomplice in the commission or attempted commission of a robbery.” (CALJIC No. 8.81.17.) The jury found the special circumstance true with respect to Harris. In so doing, the jury specifically determined that the killing was committed while Harris was engaged in the commission of a robbery. Even if the evidence arguably would have permitted the jury to find that the robbery had ended or had been abandoned by the time Williams was shot, this verdict shows that the jury did

not draw that conclusion: to the contrary, the jurors found beyond a reasonable doubt that Williams was killed while Harris was engaged in a robbery. Because the jury's true finding on the special circumstance allegation demonstrates that it necessarily rejected the factual theory on which rests Harris's argument for instructions on second degree murder, voluntary manslaughter, and self-defense, any error in failing to give the requested instructions was harmless under any standard.

## **II. Sufficiency of the Evidence to Corroborate Accomplice Testimony**

Harris argues his convictions should be reversed because they were based solely on the uncorroborated testimony of accomplice Ray. "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." (§ 1111.) Accordingly, "[t]o corroborate the testimony of an accomplice, the prosecution must produce independent evidence which, without aid or assistance from the testimony of the accomplice, tends to connect the defendant with the crime charged." [Citation.]" (*People v. Szeto* (1981) 29 Cal.3d 20, 27.)

"The corroborating evidence may be circumstantial or slight and entitled to little consideration when standing alone, and it must tend to implicate the defendant by relating to an act that is an element of the crime. The corroborating evidence need not by itself establish every element of the crime, but it must, without aid from the accomplice's testimony, tend to connect the defendant with the crime. [Citation.] The trier of fact's determination on the issue of corroboration is binding on the reviewing court unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime." (*People v. McDermott* (2002) 28 Cal.4th 946, 986; see also *People v. Abilez* (2007) 41 Cal.4th 472, 505.) Here, the corroborating evidence was sufficient to satisfy the requirements of section 1111 because it tended to connect Harris with the charged offenses.

McDowell's testimony corroborated Ray's account by connecting Harris to the offenses and by supplying a motive for the events here. McDowell testified to multiple previous conflicts between drug-dealing competitors Williams and Harris in the weeks before the shooting. She described how Harris and Butler approached her only days before the shooting with instructions that she tell Williams to stop what he was doing; they also communicated that they were armed. This testimony tended to corroborate Ray's testimony that Harris's purpose was to pressure his drug-selling competitor to abandon the Huntington Hotel. Moreover, while McDowell did not make a conclusive identification of Harris as the shooter, she told the police that the shooter was very dark-skinned and tall like Harris, and that the only people she knew who were as dark skinned as the person she saw were Harris and his cousin.

Cell phone records also corroborated Ray's account by tending to establish that Harris and Butler were in the vicinity of the Huntington at the time of the events here. Finally, Foley's account of seeing a group of men, one of whom looked like Ray, converge at Williams's door from multiple directions, tended to corroborate Ray's account of the conspiracy. Foley observed that no one spoke before knocking on the door, indicating that the members of the group had previously coordinated their plans.

Accordingly, sufficient evidence corroborated Ray's testimony that Harris participated in a conspiracy to rob Williams.

## **DISPOSITION**

The judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.